16323

United States Court of Appeals

FOR THE NINTH CIRCUIT

AUGUSTINA SEIJO, as Executrix of the Estate of Juan Seijo, Deceased,

Appellant,

vs.

DONALD L. HOBBS, et al.,

Appellees.

Appeal from the United States District Court for the Southern District of California Southern Division

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APPELLANT'S REPLY BRIEF

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Appellant,

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DONALD L. HOBBS; JOSEPH N. POMBO; JOSEPH MARCHANT; GILBERT D. MARCHANT; MANUEL G. MARCHANT; HARRY S. GARCIA; JUAN FARINHA; FRANCISCO S. JARDIM; CARMEN SEIJO; MARIA TEIXEIRA; MANUEL JOSEPH FERNANDES; MARGARET MADRUGA; MANUEL P. AMARAL; AUGUST R. LUIS, JR.; and MARIANA F. LUIS,

Appellees.

APPELLANT'S REPLY BRIEF

I

STATEMENT OF THE FACTS

In subdivision VIII of our opening brief we state: "The judgment is void as the authority of counsel to represent Juan Seijo at the hearing held after his death had terminated." Apparently the only answer made to this contention is contained in the Appellees' Statement of Facts. They have placed much emphasis upon the fact that a number of issues were determined by the interlocutory decree. However, counsel concedes that at least one issue remained and actually was determined after the death of Juan Seijo. At least one other issue remained before the final decree could be entered and is overlooked by counsel. This involves the determination of amount of the deficiency judgment as appears from the interlocutory decree itself. The estate of the deceased had a right to be represented in these matters which occurred after death. If they had been, perhaps the amount of the final decree would have been reduced even further. The fact that in counsel's opinion such representation would have made little difference in the outcome of the case is no justification for the denial of such rights.

It is noted that appellees have referred to a Minute Order on pages 4 and 5 of their brief, which is not found in the transcript of the record.

II

THE TRIAL COURT DOES NOT DERIVE "POWER" TO SUBSTITUTE PARTIES AND AMEND DECREES FROM THE RULES CITED.

The appellees have cited several admiralty rules of procedure for the proposition that the trial court is thereby empowered to act as it did in this case. This is incorrect as the rules are merely procedural tools for the court to carry out actions otherwise authorized by the law. This appears from the Supreme Court Admiralty Rules themselves wherein the District Courts are permitted to "regulate their practice". In speaking of court rules the United States Supreme Court has said:

> "But no rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law. This is true, whether the court to which the rules apply be one of law, or equity, or of admiralty. It is true of rules of practice prescribed by this court for inferior tribunals, as it is of the rules which lower courts make for their own guidance under authority conferred."
> Washington-Southern Navigation Company vs. Philadelphia Steamboard Company, 263 U.S. 629, 635-636 (1924).

This problem is discussed in Moore's work on Federal Procedure wherein it is recognized that a statute of limitations takes precedence over rules of

procedure: "A statute of limitations involves substantive right. 'Said rules shall neither abridge, enlarge nor modify the substantive rights of any litigant.' " (28 U.S.C. Sec. 723 et seq.).4 Moore, Federal Procedure, 2d Ed., 522-523.

In view of the above, the trial court was not excused from considering the California claims statute because of the existence of the foregoing rules, nor may the latter be considered as overriding statutes of limitation or other provisions of law.

The reference to 3 Benedict on Admiralty (6th Ed), p. 193 made by appellees in subdivision II states with regard to the amendment of judgments: ".... and the error must be brought to the attention of the Court with the utmost possible diligence." No showing has been made in this case as to why the motion to substitute parties was delayed until over one year after the death of Juan Seijo and nine months after the entry of the decree.

III

THE TRIAL COURT'S DISCRETION NOT CORRECTLY EXERCISED.

In subdivision III of the brief the appellees cite cases which are clearly distinguishable from the case at bar and are not at all authority in support of the trial court's action in this case. Feener Business Schools Speedwriting Publishing Co., 249 Fed. 2d 609, (1st Cir., 1957) cited at page 11 of appellees' brief,

involved the substitution of a successor corporation as a party three years after judgment. This case, of course, did not involve the probate claims statute; furthermore, even appellees will concede that the motion in this case would have to have been made within two years under Rule 25(a). Neither is Irving Trust Company v. American Silk Mills, Inc., 72 Fed. 2d 288 (2nd Cir., 1934) cited at page 12 of appellees' brief in point here.

In Barnett v. United States, 82 Fed. 2d 765 (9th Cir., 1936) cert. denied, 57 S. Ct. 9, 299 U.S. 546, 81 L. Ed. 402 (1936) cited at page 13, the final decision of the court was announced prior to death whereas the judgment was entered after death. (The opinion makes no mention of the entry of the judgment in the name of the estate). That situation would be covered by Probate Code Section 731 and the nunc protunc entry was, of course, proper:

> "A judgment against a person who dies between the rendering of a verdict or decision and the entering of judgment thereon is not a lien on the real property of the decedent, but is payable in due course of administration."

It is noted parenthetically that appellees have quoted on page 10 of their brief the California Code of Civil Procedure Section 669 as reading: "If a party die before a verdict or decision . . ." where it actually reads: "If a party die after a verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. Such judgment is not a lien on the real property of the deceased party,

but is payable in the course of administration of his estate."

It is only where an action is pending at death that filing the probate claim is a condition precedent to the entry of judgment against the estate. California Probate Code Section 709.

In the case of Milich v. Schlesinger, 156 F. Supp. 658 (1957) cited at page 13 of the appellees' brief, the Indiana statutes in question did not require that a claim be filed even in state court where an action was pending at the time of death. Instead, the statutes merely provided that the estate be made a party. This case was originally cited by the appellant in the court below to point out that very fact.

IV

THE PROBATE CLAIMS STATUTE IS APPLICABLE TO THE CASE AT BAR

In subdivision IV the appellees make much of the fact that the order appealed from does not specifically mention that the estate is being made liable for a portion of the judgment or that the other respondents are obtaining a right of contribution or a right to compel the estate to share responsibility for their liability under the judgment. What else can be the effect of making an estate a party to a judgment other than to impose liability under its terms? Why have the respondents (not the libellants or their assignees) vigorously advanced this motion and defended this appeal if it were

not to obtain a substantial advantage over the estate? The fact that the order merely states that the judgment is "amended" to add its name and delete that of the deceased does not mean that it is not fully effective against the estate.

Appellees insist that the enforcement of the judgment against the estate is solely the concern of the Probate Court in Santa Clara County inferring thereby that a claim would have to be presented at that time. It is appellants' impression that where an action is pending at death as here, claim presentation pursuant to Probate Code Section 709 is required and that a judgment entered thereafter is enforceable against the estate without filing a further claim. The case of Peoples Home Savings Bank v. Saddler, 1 Cal. App. 189, 81 Pac. 1029 (1905), cited at page 17 of appellees' brief is not in point as the judgment was entered before death. In that case the claim would have to be filed on the judgment pursuant to California Probate Code Section 732. The court refused to consider events occurring after judgment was entered, stating that the appeal spoke as of that earlier moment:

> "The function of an appellate court is to review the action of the inferior court in rendering the judgment or making the order from which the appeal is taken...If the judgment is affirmed such affirmance is as of the date at which it was rendered." (1 Cal. App. 193)

Appellees have commented upon cases cited in subdivision V of our opening brief. These cases were, of course, not cited as being directly in point but instead

in support of principles which indicated that probate claims statutes are applicable in admiralty. Appellees have, in effect, answered none of the contentions which we have advanced in that portion of our brief.

V

AUTHORITIES CITED BY APPELLEES ON THE QUESTION OF LENGTH OF TIME ARE NOT PERSUASIVE.

Appellees have stated that Rule 59(e) is not applicable as the trial court "acted" under Rule 104 of its local rules. Rule 104 and Rule 25(a) both relate solely to substitution of parties and therefore obviously do not conflict with Rules 59 and 60 which pertain to the amendment of judgments. The rules cited by appellees have no bearing at all on the latter question. The amendment of the judgment was not at all a corollary of the order of substitution of the executrix for the defendant. It is one thing to make an estate a party to a suit and another thing to make it a party to a judgment without its being represented at hearings on the merits and without compliance with the condition precedent of claim presentation. This distinction goes to the very heart of the question in this case.

VI

CONCLUSION

A review of the authorities cited by the appellees reveals that they really do little to answer the contentions set forth in our answering brief. In many instances applicable principles are not even discussed. In view of the above and for the reasons advanced in this reply, it is submitted that the decision of the lower court must be reversed.

Respectfully submitted,

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